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IN THE SUPREME COURT FOR THE STATE OF IDAHO

MATTHEW MAZZONE,

Appellant/Claimant,

vs.

TEXAS ROADHOUSE, INC.,
Employer,

and

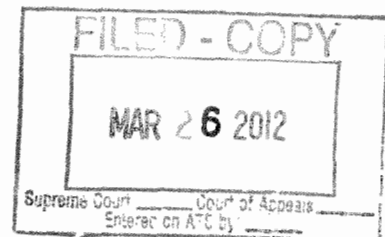
HARTFORD INSURANCE COMPANY
OF THE MIDWEST,
Surety,

Respondents/Defendants.

APPELLANT'S BRIEF

I.C. No. 2005-12469

Docket No. 39337-2011



APPEAL FROM

THE IDAHO INDUSTRIAL COMMISSION

HONORABLE LADAWN MARSTERS

REFeree PRESIDING

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II.

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STATEMENT OF THE CASE

(i) Nature of the case.

Appellant, Matthew Mazzone (Mazzone) suffered severe burn on his arm from tripping, falling and his arm being immersed into a 360° deep fat fryer while employed by Texas Roadhouse, Inc. (TRI). After the accident, Mazzone began to suffer from extremely debilitating symptoms including anxiety, severe depression, reoccurring nightmares about burning and flashbacks to the accident. Mazzone was diagnosed with post traumatic stress disorder (PTSD). Both of his treating psychiatrists opined that Mazzone's accidental burning injury and subsequent treatment were the predominant cause of his PTSD. However, the Industrial Commission denied his claim based on, inter-alia, the opinion of TRI's psychologist that Mazzone did not suffer from a traumatic event or accident.

(ii) Course of the proceeding.

Mazzone filed a complaint regarding his psychological injuries with the Industrial Commission (Commission) on February 21, 2008. (*R. p. 1.*) TRI filed an answer and denial on February 26, 2008. (*R. p. 4.*)

An evidentiary hearing was held before the Commission Referee, LaDawn Marsters on December 9, 2010. Findings of fact, Conclusions of law and Recommendations of LaDawn Marsters were filed on August 5, 2011 denying Mazzone's claim. (*R. p. 6.*)

The Commission adopted the referee's findings and conclusions under order dated August 5, 2011 stating that Mazzone failed to prove he had a psychological injury as defined by Idaho Code §72-541. (*R. p. 42.*)

Mazzone filed a request for rehearing August 24, 2011. (*R. p. 44.*) TRI filed a response on September 1, 2011. (*R. p. 49.*) The Commission denied Mazzone's request by order dated September 16, 2011 (*R. p. 49.*) Mazzone filed a request, affidavit and brief for reconsideration on September 27, 2011. (*R. p. 53, 56, and 60.*) TRI filed a response and motion to strike on

September 29, 2011. (*R. p. 87*)

Before the Commission ruled on Mazzone's request for reconsideration, Mazzone filed a notice of appeal on October 28, 2011. (*R. p. 92*).

The Commission entered an order denying Mazzone's request for reconsideration on November 1, 2011 stating the Commission did not have jurisdiction. (*R. p. 90*).

A notice of appeal was filed on the 26th day of October, 2011. Certificate of appeal was filed November 17, 2011. Certificate of record was filed November 2, 2011. Notice of completion was filed December 12, 2011. (*R. p. 97, 95, 98*).

(iii) Statement of the facts.

On a Sunday in November, 2005, while Mazzone was on duty as TRI's kitchen manager, he suffered a traumatic burn injury. It was close to closing time and TRI's kitchen staff was finishing orders, preparing for closing and cleaning. Mazzone was at a cooking station preparing a fried food order near the deep fat fryers. Another kitchen staff member left a cleaning bucket in front of the fryers, and as Mazzone backed up to turn to use the fryerS he tripped on the bucket. He tried to catch himself with his right arm which plunged into the 365 degree fryer. He screamed and tried to wash the sizzling oil off his arm. Mazzone was in so much pain that he crawled under the kitchen sink and just cried. He was taken to the emergency room at Eastern Idaho Regional Medical Center an then life flighted to the University of Utah Burn Center. (*R. p. 69; Tr. p. 33-36*). His treatment required extremely painful debridging or scrubbing dead tissue from his wounds until he bled multiple times each day. (*Tr. p. 26-27*).

Mazzone began to suffer graphic and disturbing nightmares. He describes being haunted by horrible nightmares...night tremors...flashbacks.. and repeatedly reliving his accident of falling into hot oil, his skin boiling from heat-fire, him trying to escape, crying and he and his family being on fire. (*R. p. 40; Tr. 40, L. 1-25*). His nightmares are ever present to this day. He can not sleep in he and his wife's bedroom. He saw a show on their bedroom television where a man's hands were burnt in a deep fat fryer and since then he has been unable to sleep there. (*R.*

71; *Tr. p. 41, L. 2-14*). He experiences repeated night sweats usually requiring him to change his night shirt. He reported these recurring nightmares of burning to his medical providers. (*R. 71; Tr. p. 41, L. 14-25*).

Approximately three months after the accident, Mazzone gradually returned to work. His arm wounds were still healing and he wore protective wear. He felt very uncomfortable at work. He felt breathless, nervous, sick and worried. (*R. 71; Tr. p. 42-43*). He was so uneasy in the kitchen he often switched to front store manager to avoid working in the kitchen. When he smelled the fryer scent of the kitchen, he experienced fear, nausea and panic. This fear is so overwhelming that he and his wife cannot go out to a restaurant. (*R. 71; Tr. 43-44*).

After returning to work, he was so overwhelmed that he asked to transfer to another TRI location to ease his extreme feelings and intrusive thoughts about his accident location. He transferred to a TRI store in Massachusetts but it was short-lived because the TRI restaurants are identical and nothing changed for him. His sleeping nightmares and waking anxiety grew progressively worse, resulting in less sleep and more frequent vivid nightmares of burning. (*Tr. p. 45, L. 18-25, 46, 47*).

Not a day goes by that Mazzone does not think about the day he was burned and what it has done to his family. (*Tr. p. 48, L. 19-25; p. 49, L. 1-8*). Mazzone developed a distrust of fellow employees doing things which may hurt him. His anxiety "takes [his] breath away...[his] stomach starts spinning and his head starts hurting." He feels nauseous and hears his heart beating. (*Tr. p. 49, L. 22-25; p. 50, L. 3-9*).

Mazzone sought medical help from the District Seven State Mental Health Center. Staff psychiatrist, Dr. Murdock, M.D., treated Mazzone with medications for his anxiety, depression and nightmares. (*Tr. p. 51, L. 4-25*). Even with medication, Mazzone had nightmares and flashbacks or recurrent memories of burning during waking hours. He is reminded of it everyday when he goes to the food bank to get food for his family. (*Tr. p. 53, L. 5-25; p. 54, L. 1-14*).

He continued with treatment. However, Dr. Murdock was transferred to State Hospital

South and Dr. Mary Ostrum, M.D., took over Mazzone's treatment. His mental condition deteriorated to the point of suicidal thoughts which required inpatient treatment three different times in the Eastern Idaho Regional Medical Center Behavioral Health Center. (*Tr. p. 54, L. 18-25; p. 55, L. 11-25*). In describing or rating his anxiety condition currently, he related that "some days it's extremely high...some days...it's medium." But most days are "above medium" and "never light." (*Tr. p. 57, L. 6-15*).

Mazzone tried different kinds of work. He worked as a technician changing toner cartridges but that job did not work out. He was asked to climb up into a ceiling and a coworker "was to hold the ladder for him. And sure enough that didn't happen, and [he] did fall and get hurt. And that just reinforced the premise of [him] not being able to have much trust in anybody [he] work[ed] with." (*Tr. p. 59, L. 4-12*).

Mazzone testified he really misses his career and the ability to support his family. (*Tr. p. 67, L. 17-25*). This remembrance translates into his sense of a foreshortened future. In this regard he shared that:

"[His] future is uncertain...it's really hard when you don't know where your next meals coming from or how you're going to get toys for your kids at Christmas. It's hard to think about tomorrow or the next day, let alone your future."

(*Tr. p. 66, L. 8-23*).

Randi Mazzone

Mrs. Mazzone (hereinafter referred to as Randi) was at his side at the Burn Center at University of Utah Medical Center. She vividly remembered:

"That he was in a great deal of pain, that he was heavily medicated, that they had to dress his wounds several times a day. That was an extremely painful process. That they...[gave] an extra dose...of pain medicine beforehand so that they could debride his wound which was tortuous to watch cause he was in screaming pain...they would have several nurses come in to [hold] down his legs...so he wouldn't thrash about while they were doing it...The took...steel bristle like brush tool to scrape off all the dead skin [and]...soapy wash cloth to clean the area."

(*Tr. p. 116, L. 13-25; p. 117, L. 1-18*).

After Mazzone returned home, Randi observed that it was disturbing to watch Mazzone sleep because he does not look like he is really sleeping. He is twitching and talking. On several nights she woke up to Mazzone screaming while he is still asleep and him darting out of bed in a dead run like he is trying to get away and running straight into the wall, knocking himself out. He is screaming "make it stop, it hurts, I'm burning." When she asked what he was trying to get away from he replied "burning". (*Tr. p. 118, L. 13-25; p. 119, L. 1-10*).

She further described how Mazzone has changed since his burn. Before the burn he was very outgoing and friendly. They would have company over or go out to dinner with friends. He had a very extroverted personality. He was caring, warm, and fun to be around. He would make her fancy dinners. He does not do that anymore. He has become very withdrawn. He does not talk to people. At home he segregates himself and is not very interactive with the family. He is very quiet. (*Tr. p. 119, L. 17-25; p. 120, L. 4-11*).

A few months before the hearing, Randi related that they were in their bedroom watching a television show which showed someone burning. He instantly left the room and has not been back since. He sleeps on the couch now. (*Tr. p. 120, L. 12-23*).

Even with medication to help him sleep, he is having dreams which torment him. When he hears sounds of boiling water or smells cooking oil or burnt dinner, he is very disturbed. They have tried to go out to dinner. After they get seated and order, Mazzone gets up and walks out and she stays to pay the check. For a long time before that, he could not handle even driving by some restaurants. (*Tr. p. 121, L. 20-25*).

Randi spoke of Mazzone wanting and trying to work but distrusting co-workers putting him into situations which would lead him to being injured. She related how he sees his roll as that of the breadwinner, the sole breadwinner. He feels that he needs to provide for his family. He's always wanted to work. But, even now, he has an extremely distressful time working because of his fear of co-workers. (*Tr. p. 122, L. 14-25; p. 123, L. 1-6*).

Doctor Chad Murdock, M.D.

Dr. Chad Murdock, M.D. is a licensed psychiatrist experienced in treating adults and children since 1981. He was employed by the District Seven State Mental Health Outpatient Center where he began treating Mazzone in 2008 through 2009. (*R. p. 68; CM Dep p. 5, L. 17-25*). He described Mazzone's symptoms including a lot of nightmares, thrashing around in his sleep, feelings of hopelessness and being a failure because he'd try to go to work and fall apart, raising issues about him not feeling responsible. Mazzone would regress just by going into a restaurant and sensing the deep fat fryers. Just being in the restaurant would make him severely anxious and distressed being sensitive to those smells.

Dr. Murdock further expressed that traumatic flashbacks and dreams of reliving different aspects of trauma is a very common and frequent symptom of post traumatic stress. (*Dr. Murdock Depo. (CM Dep.) p. 8, L. 23-25; p. 9, L. 1-10; p. 12, L. 1-16*). Mazzone spoke to Dr. Murdock about being burned in the deep fat fryer while working at TRI, painful treatment at the burn unit at University of Utah Hospital, what had happened and things that were triggering similar PTSD symptoms, depression and anxiety. (*CM Dep. p. 8, L. 14-20*).

As Dr. Murdock evaluated him, Mazzone related reliving debridement at the burn unit which was terrifying. Dr. Murdock's review of Mazzone's chart notes revealed that (1) being back in the restaurant re-triggers the smell of burning flesh; (2) having nightmares and screaming "get me out of the hot"; (3) having a hard time keeping jobs because of anxiety and stress; (4) feeling worthless because he can not keep a job; (5) continuing nightmares; and (6) worrying about the anniversary of his burn with anxiety being at the highest it's been since his son had to go to the burn center of Salt Lake in 2008. (*R. 75; CM Dep. p. 13, L. 7-25; p. 14, L. 1-25; p. 15, L. 14-16*).

Dr. Murdock's clinical notes are supported by the intake assessment which records that since Mazzone's burn:

"[H]e has been experiencing nightmares, foreshortened sense of the future, crying spells, mood instability, anxiety, flashbacks,

intensive memories, sleep problems, hypersensitivity, and feeling as if his body and psyche are much more fragile...He gets severe headaches [and] has great difficulty eating fried foods because smell will often trigger an olfactory flashback to the smell of burning flesh."

(CM Dep. Exh F, p. 3, Claimant's Exhibit F, p. 3).

Dr. Murdock diagnosed Mazzone with post traumatic stress disorder (PTSD) and severe depression. In defining the severity of the PTSD he pointed to Mazzone's flashbacks from the smell of burning skin triggered by smells of the restaurant, nightmares springing from fears of going back into the fryer and terrors associated with his debridement at the burn center. (*R. 76; CM Dep. p. 18, L. 9-25; p. 19, L. 1-13*).

In Dr. Murdock's report of December 3, 2007, he opined that "Mr. Mazzone's current symptoms are a direct result of the trauma he suffered due to his industrial frying accident at Texas Roadhouse and the trauma he suffered in the treatment of his severe burns from his accident." (*CM Dep. Exhibit F, p. 2, Claimant's exhibit p. 2*).

When Dr. Murdock was asked his opinion as to the predominant, primary aggregate cause of all causes causing PTSD, he stated "[T]he burns and their treatment." (*R. 76; CM Depo p. 20, L. 15-23*).

Doctor Mary Beth Ostrum, M.D.

Dr. Ostrum, M.D. is a board certified psychiatrist since 1991 and worked at State Hospital until 2008. She went on staff at the EIRMC Behavioral Health Center (BHC) in 2006. (*MO Depo. p. 4, L. 10-25; p. 5, L. 1-8*).

Dr. Ostrum first saw Mazzone during a stay at the BHC in 2009 and remembered him being very depressed and suicidal with issues arising from his post traumatic stress disorder. She also treated him on an outpatient basis at the Mental Wellness Center. (*MO Depo p. 7, L. 12-22; p. 5, L8-21*).

Dr. Ostrum testified that subsequent to Mazzone's traumatic injury in 2005, he exhibited issues with intrusive recollection, frequent nightmares related to the event, and recall of the event

on a daily basis. (*MO Depo p. 11, L. 1-10*).

Dr. Ostrum opined that the cause of Mazzone's PTSD was the workplace injury when he was severely burned based on the symptoms beginning at that point in time with intrusive memories and nightmares relating to reliving the burn injury. When not medicated, the nightmares were reported as nightly and increased daily anxiety. (*MO Depo p. 13, L. 1-17*).

In her opinion, Mazzone's PTSD is causally related to his burn accident to a reasonable degree of medical certainty. (*MO Depo p. 15, L. 13-22*). Dr. Ostrum further opined that Mazzone's PTSD was predominately caused by the burn injury. (*MO Depo p. 33, L. 13-25*). The transcript of her deposition reads as follows:

"Q The PTSD that Matthew has, was it predominantly caused by the burn injury?
A. Yes."

(*MO Dep. p. 33, L. 13-25; See appendix A*)

IV.

ISSUES PRESENTED ON APPEAL

WERE THE COMMISSION'S FINDINGS AND CONCLUSIONS THAT MAZZONE DID NOT SUFFER A PSYCHOLOGICAL INJURY UNDER IDAHO CODE §72-451 SUPPORTED BY SUBSTANTIAL AND COMPETENT EVIDENCE?

V.

ATTORNEY FEES ON APPEAL

Appellant claims attorney's fees under Idaho Code §72-804 based upon TRI and it's surety contesting his claim without reasonable grounds.

VI.

ARGUMENTS

A.

STANDARD OF REVIEW

"When this Court reviews a decision of the Commission, it exercises free review over question of law. See *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). With respect to the questions of fact, the Court's review is limited to determining whether substantial and competent evidence supports

the decision. See *Matter of Wilson*, 128 Idaho 161, 164, 911 P.2d 754, 757 (1996). If the Commission's findings of fact are supported by substantial and competent evidence, they will not be disturbed on appeal. See *Reedy v. M.H. King Co.*, 128 Idaho 896, 920 P.2d 915 (1996). Further, "[t]his Court's review of Commission decisions is limited to determination of whether the findings of fact are supported by substantial and competent evidence." *Boley v. State*, 130 Idaho 278, 280, 939 P.2d 854, 856 (1997); I.C. § 72-732(1). Substantial evidence is more than a scintilla of proof, but less than a preponderance. See *Boley*, 130 Idaho at 280, 939 P.2d at 856. It is relevant evidence that a reasonable mind might accept to support a conclusion. *Id.*

In addition, it is within the Commission's province to decide what weight should be given to the facts presented and conclusions drawn from those facts. See *Seamans v. Maaco Auto Painting & Bodyworks*, 128 Idaho 747, 918 P.2d 1192 (1996). The Commission's conclusions on the weight and credibility of the evidence should not be disturbed on appeal unless they are clearly erroneous. See *Wheaton v. Indus. Special Indem. Fund*, 129 Idaho 538, 928 P.2d 42 (1996)."

Zapata v. JR Simplot Co., 138 Idaho 513, 514 975 P.2d 1178, 1179 (1999).

B.

THE COMMISSION'S FINDINGS AND CONCLUSIONS THAT MAZZONE DID NOT SUFFER A PSYCHOLOGICAL INJURY UNDER IDAHO CODE § 72-451 ARE NOT SUPPORTED BY SUBSTANTIAL AND COMPETENT EVIDENCE.

According to I.C. § 72-451, physical-mental injuries are compensable, but they must meet the following conditions paraphrased as:

- "1) The injury was caused by an accident and physical injury or occupational disease or psychological mishap accompanied by resultant physical injury;
- 2) The injury did not arise from conditions generally inherent in every working situation or from a personnel related action;
- 3) Such accident and injury must be the predominant cause as compared to all other causes combined of any consequence;
- 4) The causes or injuries must exist in a real and objective sense;

5) The condition must be one which constitutes a diagnosis under the American Psychiatric Association's most recent diagnostic and statistics manual, and must be diagnosed by a psychologist or psychiatrist licensed in the jurisdiction in which treatment is rendered."

In addition, it must be proven by clear and convincing evidence that the psychological injuries arose out of and in the course of employment from an accident or occupational disease. I.C. § 72-451(6). "Clear and convincing evidence means a degree of proof greater than a mere preponderance." *In the Matter of Gordon W. Jenkins*, 120 Idaho 379, 383, 816 P.2d 335, 339 (1991). Further, the statute provides that it should not "be construed as allowing compensation for psychological injuries from psychological causes without accompanying physical injury." I.C. § 72-451."

Luttrell v. Clearwater Co. Sheriff's Office, 140 Idaho 581, 582, 97 P. 3d 448, 449 (2004).

Our Supreme Court recognized that: "[W]e must liberally construe the provisions of the workers' compensation law in favor of the employees in order to serve the humane purposes for which the law was promulgated." *Murray-Donahue v. National Car Rental License Ass'n*, 127 Idaho 337, 340, 900 P.2d 1348, 1351 (1995); *Jensen v. City of Pocatello*, 135 Idaho 406, 18 P.3d 211 (2000).

If there is doubt concerning whether the accident in question arose out of and in the course of employment, it will be resolved in favor of the employee. *Stevens-McAtte v. Potlatten Corporation*, Docket No. 35342 (2008); *Page v. McCain Foods Inc.*, 141 Idaho 342, 109 P.2d 1084 (2005); *Dinius v. Loving Care and More, Inc.*, 133 Idaho 572, 990 P.2d 738 (1999).

The American Psychiatric Association DSM-IV-TR manual sets forth the criteria for posttraumatic stress disorder as follows:

"A. The person has been exposed to a traumatic event in which both of the following have been present:

(1) the person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others (2) the person's response involved intense fear, helplessness, or horror. Note: In children this may be expressed instead by disorganized or agitated behavior.

B. The traumatic event is persistently reexperienced in one (or more) of the following ways:

- (1) recurrent and intrusive distressing recollections of the event, including images, thoughts, or perceptions. Note: in children, repetitive play may occur in which themes or aspects of the trauma are expressed.
- (2) recurrent distressing dreams of the event. Note: In children, there may be frightening dreams without recognizable content.
- (3) acting or feeling as if the traumatic event were recurring (includes a sense of reliving the experience, illusions, hallucinations, and dissociative flashback episodes, including those that occur upon awakening or when intoxicated). Note: In young children, trauma-specific reenactment may occur.
- (4) intense psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event.
- (5) physiological reactivity on exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event.

C. Persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness (not present before the trauma), as indicated by three (or more) of the following:

- (1) efforts to avoid thoughts, feelings, or conversation associated with the trauma
- (2) efforts to avoid activities, places, or people that arouse recollections of the trauma
- (3) inability to recall an important aspect of the trauma
- (4) markedly diminished interest or participation in significant activities
- (5) feeling of detachment or estrangement from others
- (6) restricted range of affect (e.g., unable to have loving feelings)
- (7) sense of foreshortened future (e.g. does not expect to have a career, marriage, children, or a normal life span)

D. Persistent symptoms of increased arousal (not present before the trauma), as indicated by two (or more) of the following:

- (1) difficulty falling or staying asleep
- (2) irritability or outbursts of anger
- (3) difficulty concentrating
- (4) hypervigilance
- (5) exaggerated startle response

E. Duration of the disturbance (symptoms in Criteria B, C, and D) is more than one month.

F. The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.

Specify if: Acute: if duration of symptoms is less than 3 months
Chronic: if duration of symptoms is 3 months or more

Specify if: With Delayed Onset: if onset of symptoms is a least 6 months after the stressor."

(R. p. 27, 28; DSM-IV-TR p. 476-468) (emphasis added). "In addition, the DSM-IV-TR provides that malingering should be ruled out in situations implicating secondary gain motivations." (*Id. at p. 467*). " (R. p. 27, 28, Findings p. 22, par. 60, p. 23, par. 60).

1.

MAZZONE PROVIDED COMPELLING, COMPETENT AND SUBSTANTIAL PROOF REGARDING EACH ELEMENT OF IDAHO CODE SECTION 72-451.

Mazzone was working for TRI as a kitchen manager when the accident occurred in the kitchen area of TRI restaurant. His right arm was burned by a 365 degree fryer in TRI's kitchen. His skin was severely and physically injured, requiring a life flight to a burn center where he underwent extremely painful debridement treatments.

After his horrific burn accident, Mazzone began to experience vivid, recurrent and severe nightmares centered around burning and trying to escape from burning. He would wake up screaming and running at a dead run into a wall. After he returned to work, the sights and smells of the kitchen triggered flash backs to the accident and reminded him of his burning flesh. At these moments, Mazzone described his physical reaction as anxious, breathlessness and nausea. The triggers, for these reactions, were not isolated to being in TRI's restaurant or work place but being in any restaurant, cooking at home, watching television and seeing people on TV being burned.

As these nightmares, flashbacks and anxiety became unmanageable and Mazzone became hopeless, Mazzone sought professional help. He went to District Seven State Mental Health

Center. He was assessed, diagnosed and treated for post-traumatic stress disorder (PTSD) and severe depression. Dr. Chad Murdock, M.D. confirmed this and opined that Mazzone did suffer from PTSD and severe depression. He described the symptoms of the PTSD as the nightmares, flashbacks and anxiety which featured burning as the theme or source of origination. Based on the direct correlation between the symptoms of the PTSD revolving around burning and the accident involving burning, Dr. Murdock determined that Mazzone's PTSD was caused by the accident and the accident was the predominant cause of Mazzone's PTSD. Dr. Murdock specifically testified that:

"Mr. Mazzone's current symptoms are a direct result of the trauma he suffered due to the industrial accident at Texas Roadhouse and the trauma suffered in the treatment of his severe burn from the accident."

(*R. 77; DM Dep. p. 21, L. 4-7*). Dr. Murdock further opined that the "burns and their treatment" were "the predominant, primary, or greatest cause of all causes causing his PTSD." (*R. 76; DM Dep. p. 20, L. 7-23*).

When Dr. Murdock was questioned about other potential causes of Mazzone's PTSD including trauma of Mazzone and Randi's still born baby, Dr. Murdock recalled that it occurred three years prior to the burn accident and Mazzone had been hospitalized briefly but had actually snapped out of it and had been functioning and working. And after considering the possible causes of Mazzone's PTSD, Dr. Murdock affirmatively agreed that Mazzone's traumatic burn injury at TRI and burn treatment was the predominant cause as opposed to all others. Dr. Murdock does not identify any cause for the PTSD other than those flowing from Mazzone's burn accident in the deep fat fryer at TRI.

Dr. Ostrum came to the same conclusion as did Dr. Murdock regarding Mazzone's severe burn being the cause of his PTSD "[b]ecause his symptoms began after that point in time with the intrusive memories and nightmares and the gradual increasing issues associated with the triggers in that environment" with the nightmares relating to Mazzone reliving the burn incident. (*DO Dep. p. 12, L. 16-25*).

The compelling and undeniable causal link between Mazzone's burn accident and his PTSD, is the prominent symptoms/nightmares, flashbacks and anxiety sharply focused on burning and reliving the accident in TRI's restaurant.

Elements of Section 72-451.

Mazzone was accidentally burned in the course of his employment with TRI. Because of the accident, he began having recurrent nightmares and flashbacks of burning and developed the psychological injuries of post traumatic stress disorder, anxiety and severe depression. His PTSD symptoms include sleeplessness, sweating, nausea, anxiety and depression. The cause and the injury exist in a very real and objective sense. Mazzone's PTSD injury did not arise from conditions generally whereas in every working situation from personnel related actions.

His accident and injury are a predominant cause as compared to all other causes. Mazzone's PTSD condition was diagnosed by two treating licensed psychiatrists and constitutes a diagnosis under the American Psychiatric Association's most recent diagnosis manual DSM criteria.

Criteria of DSM Manual.

Mazzone was exposed to the traumatic event of his arm being immersed in a 360° hot deep fat fryer and terrifying medical treatment. His burning experience included a serious injury to his skin and a threat to his physical integrity. Mazzone's response involved intense fear, helplessness and horror. He repeatedly relives the horror of burning in nightmares and flashbacks. He is afraid or seriously anxious about going into a restaurant or working with others again. The smell of a deep fat fryer triggers the sense of his burning flesh. He has a hard time working because of his anxiety over being hurt again, which leads to him feeling worthless, rendering him hopeless.

Mazzone persistently re-experiences this traumatic burning event by recurrent and distressing dreams of the event, recurrent and intrusive recollections of the event and feeling as if the event were reoccurring.

Mazzone experiences intense anxiety or psychological distress or reactivity to cues that symbolize the event including the smell of a deep fat fryer triggering the smell of burning flesh and his intense anxiety resulting in his leaving a restaurant shortly after he sits down and orders.

Mazzone persistently avoids the stimulus associated with the trauma in a number of ways. He avoids restaurants and he will not work with others fearing they will harm him. He was an outgoing and friendly person before the traumatic injury. He used to make fancy dinners, have friends over, or go out and socialize. His wife Randi Mazzone described him as caring, warm, extroverted and fun to be around before his accident. She testified that since the accident he is very withdrawn, he does not talk to people, he is quiet, and at home he segregates himself and is not very interactive with his family.

Mazzone has persistent symptoms of increased arousal which were not present before his accident. He has extreme difficulty sleeping. He has nightmares, screams about burning and tries to escape. He has a hard time concentrating because of intrusive thoughts or flashbacks of burning or fears of being burnt.

The duration of Mazzone's psychological disturbances are daily and become so severe he requires inpatient treatment for suicidal ideation.

Mazzone's psychological disturbance pervades every area of his life from sleep, work and social interaction with family and others, resulting in clinically significant distress or impairment in social, occupational, or other important areas of functioning.

Mazzone's psychological disorders more than meet all of the criteria diagnosis of PTSD under the DSM-IV manual of the American Psychiatric Association.

2.

THE COMMISSION REFEREE RELIED ON EVIDENCE OUTSIDE THE RECORD,
SUPPLIED IT'S OWN UNQUALIFIED MEDICAL OPINION, DISREGARDED TESTIMONY
OF TREATING PHYSICIANS AND ACCEPTED AN UNSUBSTANTIATED MEDICAL
OPINION.

Our workers' compensation law does not require a worker to be in good health at the time of his or her injury. The fact that a worker may have been weak and predisposed to injury does

not prevent an award "since our compensation law does not limit awards to workmen who, prior to the injury were in sound emotion and perfect health. Rather, an employer takes an employee as he finds him." Wynn v. JR Simplot Co., 105 Idaho 102, 103, 666 P.2d 629, 632 (1983); Miller v. Bingham County, 79 Idaho 87, 310 P.2d 1089 (1957); Lewis v. Department of Law Enforcement, 79 Idaho 40, 311 p.2d 976 (1957); Warlick v. Driscoll, 68 Idaho 552, 200 P.2d 1014 (1948); Teater v. Dairy-men's Cooperative Creamery, 68 Idaho 152, 190 p.2d 687 (1948); Cain v. C.C. Anderson Co., 64 Idaho 389, 133 P.2d 723 (1943); Woodbury v. Arata Fruit Co., 64 Idaho 227, 130 P.2d 870 (1942); Aranguena v. Triumph Min. Co., 63 Idaho 769, 126 P.2d 17 (1942); Paull v. Preston Theaters Corp., 63 Idaho 594, 124 P.2d 562 (1942); In re Soran, 57 Idaho 483, 67 p.2d 906 (1937); Beaver v. Morrison-Knudsen Co., 55 Idaho 275, 41 P.2d 605 (1935); Fealka v. Federal Min. Etc. Co., 53 Idaho 362, 24 p.2d 325 (1933); Strouse v. Hercules Min. Co., 51 Idaho 7, 1 p.2d 203 (1931); Hanson v. Independent School Dist. 11, 50 Idaho 81, 294 P. 513 (1930); In re Larson, 48 Idaho 136, 279 P. 1087 (1929). This court has held that:

"No special verbal formula is necessary when, as here, a doctor's testimony plainly and unequivocally conveys his conviction that events are causally related."

Paulson v. Idaho Forest Indus., Inc., 99 Idaho 896, 910, 591 P.2d 143, 148 (1979); Jensen v. City of Pocatello, 135 Idaho 406; 18 P.3d 211 (2000).

The Commission relied on evidence outside the record which were not submitted as exhibits, testimony or by deposition as requested by Rule 10 of the Judicial Rules of Practice and Procedure.

In findings number 9 and 37 the Commission reviewed Mazzone's prescription history and gave it's own unqualified medical opinion of what Mazzone's preinjury medical diagnosis based on his prescriptions, stating:

"Claimant has a prescription history...indicating treatment for sleeplessness, bipolar disorder, anxiety disorder, migraines and depression. Beginning in 2001, Claimant received Lorazepam pills, **commonly prescribed** for short-term treatment of severe anxiety and panic attacks, as well as migraines; Zoloft anti-depressant pills; Zyprexa pills, commonly prescribed to treat

bipolar disorder; Temazepam pills, **commonly prescribed** for insomnia; Clonazepam pills currently prescribed to treat seizures and panic disorder, as well as migraines; Topamax pills commonly prescribed for epileptic seizures and migraines; Gabitril pills, **commonly prescribed** to treat partial epileptic seizures and migraines; and Ambien sleep aid pills."

(R. p. 11; Findings, p. 6, par. 9).

The Commission again provided unqualified medical testimony as to Mazzone's post-injury prescription record as follows:

"Claimant has a prescription history at Walgreen's Pharmacy following November 13, 2005, **indicating treatment** for sleeplessness, bipolar disorder, anxiety disorder, seizures and depression. In 2007 and 2008 Claimant received Sonata sleeping aid pills; Alprazolam pills, commonly prescribed to treatment anxiety disorder and panic attacks..."

(R. p. 19; Findings p. 14, par. 37).

The entire DSM-IV manual was not admitted into evidence but the Commission quoted from it in findings 10, 19, and 27 to medically interpret without qualified medical testimony to make findings 28, 29, 32, 70 and 77. *(R. p. 11-12, Findings p. 6-7; R. p. 14, Findings p. 9; R. p. 16,17; Findings p. 16-17).*

It is one thing for the Commission to choose to accept or reject medical testimony but it is quite another for the Commission to give unqualified medical opinions which were not evidence submitted by exhibit, testimony or by deposition as required by Rule 10. Idaho Code §72-451 requires evidence from a licensed psychiatrist or psychologist. The Commission went clearly beyond the bounds of it's discretion and made findings not based on competent evidence.

The Commission referee utilized the **internet** to find a reference in the DSM manual to find that (1) PTSD sufferers dread their anniversary of their traumatic event, (2) Mazzone's treating physician, Dr. Murdock only reported [PTSD] symptoms of worsening in anticipation of the second anniversary, (3) no proof of dread of the first anniversary exists inferring that Mazzone does not have PTSD. *(R. 30, Findings, p. 25, par. 67).*

First, the internet references by the Commission were not evidence in the record or

offered into the record by any party or in medical testimony. Second, the way the information was used was to render an unqualified medical opinion about what a medical doctor would expect before the anniversary of a trauma. Third, the Commission's overly narrow and hypertechnical view of Mazzone's PTSD, completely disregards the evidence of Mazzone's daily dread of burning and the worsening of his symptoms as recorded on the second anniversary. The only logical inference would be that if a PTSD sufferer dreads the second anniversary of being severely burned and has nightmares nightly about them, the PTSD sufferer would have also dreaded the first anniversary.

The unoffered, unadmitted and unqualified internet evidence can not be relied on to record evidence of the sworn testimony of a qualified medical doctors. The Commission exceeded the boundaries of it's discretion by relying on evidence not in the record and offering unqualified and unsubstantiated medical opinions to deny Mazzone worker's compensation claim.

This court should not agree with the Commission's overly narrow and overly technical view of the circumstances of this injury or allow the Commission to rely on evidence which is neither admitted nor competent to controvert the sworn, qualified, and admitted evidence of Mazzone's treating physician. *Wynn v. JR Simplot*, 105 Idaho 102, 666, P.2d 629 (1983). The Commission's impeachment of Mazzone's treating physician is not substantiated.

Finding 61 took exception to the fact that Dr. Murdock's treatment of Mazzone relied on intake assessments of other medical personnel and clinical assessment of Mazzone with no other testimony, evidence, or authority that it is medically unreasonable for a treating physician to diagnose or treat without personally performing the intake or testing. (*R. p. 23; Findings p. 23*).

Finding 62, incorrectly concludes and mischaracterizes that Mazzone incorrectly reported no history of psychological disorder during his intake assessment. (*R. p. 29, Findings p. 24*). The medical record in this regard simply states the fact that "[p]rior to his accident, Mr. Mazzone reports one other "major" depressive episode after a stillborn death of his daughter." (*CM Depo*,

Exh. F, p. 4, par. 4). The context of the medical record is that Mazzone was asked what other "major" depression episodes he has experienced. Doctor Murdock was fully aware of this traumatic event of their stillborn child when he determined that Mazzone's horrific burn accident and painful treatment thereafter were the predominant cause of his PTSD nightmares and all other PTSD symptoms which revolved around burning.

Finding 62 also cites error in Dr. Murdock's diagnosis because he did not state that he ruled malingering out. The Commission misapplies the unsubstantiated/unadmitted internet evidence that the DSM manual which provides "that malingering should be ruled out in situations implicating secondary gain motivation". First, it was reasonable to assume Dr. Murdock's opinion did not view that Mazzone's situation implicated secondary gain. Second, TRI's IME psychologist reports that the results of Mazzone's memory malingering testing "did not confirm malingering." (*Def. Exh. 32, p. 9, par. 3, p. 10, par. 1*). The Commission even noted that Dr. Enright backed off his allegation that Mazzone is malingering. (*R. 39; Findings p. 34, par. 88*).

It is uncontroverted that Mazzone is not malingering. Nevertheless, the Commission's finding 62 improperly cited malingering as a reason that Mazzone's treating physician did not consider the DSM criteria for PTSD diagnosis. (*R. p. 39; Findings p. 24*).

Finding 63 makes a distinction without a qualitative difference. The Commission tried to impeach Dr. Murdock's diagnosis because he did not diagnose bipolar disorder. First, there is no qualified expert testimony, evidence or authority that PTSD cannot exist if a person has a pre-existing bipolar disorder. Secondly, Mazzone's other treating physician Dr. Ostrum diagnosed him with both PTSD and bipolar disorder. (*R. p. 29; Findings p. 24*).

Finding 64 misstates the record by finding that Dr. Murdock did not address the subject matter of Mazzone's recurrent nightmares. Dr. Murdock testified that Mazzone's intake questionnaire records that Mazzone wakes up in the middle of the night screaming "get me out of the hot". In regards to Mazzone's nightmares about burning, Dr. Murdock testified that traumatic

flashbacks and dreams and reliving different aspects of trauma is a very common and frequent symptom of post traumatic stress "...and Mazzone had issues about reliving things related to the burn unit...and was terrified and reliving that..." and waking up in the middle of the night screaming "get me out of the hot" so that is what he was reliving. (*CM Depo. p. 12, L. 14-25; P. 13, L. 7-12*).

In Finding 65, the Commission states that [any] prior difficulties sleeping and concentrating disqualify Mazzone from satisfying DSM manual criteria which require two or more "persistent" symptoms (not present before the trauma) regarding (1) sleeping, (2) anger, (3) concentration, (4) hyper vigilance, (5) exaggerated response. The Commission concedes that anger issues are recorded in the medical record but states that Dr. Murdock did not actually observe Mazzone being hyper vigilant. Prior to being burned, Mazzone did not have reoccurring nightmares about burning which were affecting his sleep. The recurring burning nightmares were recorded after his burn trauma. First, he has met the criteria. Second, a treating physician does not have to actually observe a symptom to reach a diagnosis. And third, the law does not disqualify Mazzone for having prior medical problems.

Finding 68 erroneously concludes that (1) a patient's symptoms of **PTSD** must be recorded immediately after the traumatic injury (2) there is nothing in the records that Mazzone had been experiencing symptoms and/or (3) a medical doctor must identify whether a PTSD is acute or delayed onset in order to diagnose PTSD. The record does not contain any expert evidence to support these conclusions. Mazzone's wife, Randi, testified that after getting home from the hospital around Christmas of 2005, Mazzone woke up, jumped out of bed screaming "make it stop, it hurts, I'm burning." (*Tr. p. 117, L. 19-25; p. 119 L. 1-10*). She testified that "on several occasions I have woken up to him screaming and he is still asleep. And several time he just darted out of bed on a dead run screaming like he is trying to get away with some thing and it's obvious he's unaware of where he's at because he's ran straight into the wall and knocked himself [out]." (*TR p. 118, L. 16-25*).

Findings 71 and 72 are not supported by the record. Dr. Murdock did account for the second major traumatic event in Mazzone's life regarding his stillborn daughter. Dr. Murdock reviewed the medical issues relevant to his diagnosis and considered the impact of Mazzone's stillborn baby. The doctor focused on all of the PTSD symptoms, nightmares, flashbacks and anxiety relating to burning smells of restaurants or deep fat fryers, triggering symptoms which directly related to Mazzone's traumatic accident. Dr. Murdock as well as Dr. Ostrum determined that the burn accident was the predominant cause of all his PTSD symptom which feature burning as the central theme as opposed to the depression he suffered from the loss of his baby. Dr. Ostrum considered Mazzone's bipolar diagnosis when determining that his burning was the predominant cause of his PTSD. (*Finding 74*).

In regards to Findings 74, 75 and 76, the Commission requires absolute and unreasonable medical precision and improvised Commission imposed medical protocol which has no basis anywhere in the record, testimony or other authoritative source admitted in the record. The Commission has exceeded its discretion to come up with medical rules which were not proven and do not exist.

Finding 76 excludes Dr. Ostrum's opinion evidence although her deposition was admitted into the record pursuant to Rule 10. (*Tr. p. 1-140*). The Commission can not exclude evidence in this manner. (*Rule 10*).

Finding 77 requires Dr. Ostrum to precisely parrot the criteria of the DSM manual rather than to consider all the facts she determines as medically reasonable or required to make the diagnosis she made. Medical testimony is not required to be an exact duplicate of the standard. Jensen v. City of Pocatello, 135 Idaho 406, 18 P.3d 211.

Finding 77 does not accurately state Dr. Ostrum's testimony. The Commission states that Dr. Ostrum did not opine that Mazzone's burn accident was the predominant cause of his PTSD.

However, Dr. Ostrum's testimony clearly states that:

(A) Mazzone suffers from reoccurring nightly nightmares related to his

reliving the burn incident. *(MO Dep. p. 13, L. 1-15).*

- (B) Mazzone has PTSD relating to his burn accident. *(MO Dep. p. 15, L. 20-22; p. 16, L. 3-9)*
- (C) Mazzone's burn injury was the predominant cause of his PTSD. *(MO Dep. p. 33, L. 13-25; See p. 37 in Appendix A attached hereto).*
- (D) Mazzone has a 70% permanent impairment from his PTSD *(MO Dep. p. 19, L. 1-18; p. 23, L. 2).*
- (E) She did not feel she could apportion a percentage to pre-existing other psychiatric issue. *(MO Dep. p. 22, L. 1-3).*

Neither apportionment nor permanent impairment were at issue. Only the issue of causation was tried before the Commission. The Commission misinterpreted evidence of apportionment, which was not at issue, with causation which was at issue. *(Tr. p. 16, L. 1-6).*

Finding 78 is not a correct review of the record. Dr. Murdock and Dr. Ostrum identified trust issues which relate to how the burn accident happened to Mazzone. It is certainly inaccurate to say leaving a restaurant job due to trust issues are not obviously related to his burn injury. Remember, a co-worker had left a wash bucket near the deep fat fryer and Mazzone tripped on it and fell with his arm going into the 360° hot oil.

Findings 81, 82, 83, 84, 85, 86, 88, 90, 91, and 92 are based on an IME PhD psychologist which (1) denied Mazzone suffered from a traumatic event or accident as a basis for PTSD, (2) never once inquired what the subject of Mazzone's reoccurring nightmares were about or why he had anxiety from being in a restaurant, (3) began evaluation assessing Mazzone as a malingerer without testing, (4) disbelieved testing for malingering which did not support his "impression" of Mazzone and (5) did not review Mazzone's 2010 hospital records. *(ME Depo. p. 127, L. 22-25; p. 128 L. 1-13; p. 119, L. 19-25, p. 110, L. 1-7).*

In finding 84, Dr. Enright did not hear Mr. Mazzone express an accident or traumatic event in his description of what happened to him in a way Dr. Enright had experienced before.

So Dr. Enright determined that there was not a traumatic event from which PTSD could come from. He did so without reference to the medical records of his treating physician who identified the burn accident and treatment as a traumatic event.

Dr. Enright side stepped around Mazzone's traumatic burn injury and a medical records repleat with references to PTSD symptoms of nightmares centered around burning to arrive at the conclusion he was hired for. His opinion is not supported by the facts, record, reasonable medical references or anything substantive enough to regard as substantial and competent evidence. The essence of Dr. Enright's opinion is that Mazzone could not articulate a traumatic event or accident in the fashion Dr. Enright would accept and, because of that, Mazzone did not have PTSD. This court has consistently refused to accept our overly narrow and overly technical construction of an "accident". *Wynn v. JR Simplot Co.*, 105 Idaho 102, 666 P.2d 629 (1983).

VII.

CONCLUSION

Mr. Mazzone proved by clear, convincing, competent and substantial proof of his injury, PTSD, causation and compliance with the provisions under Idaho Code §72-451.

The Commission's Findings and Conclusions were clearly not supported by competent or substantial evidence.

Appellant respectfully requests reversal of the Commission's ruling in this matter.

DATED this 23rd day of March, 2012



Stephen A. Meikle
Attorney for Claimant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on March 23, 2012, I served a true copy of the foregoing document on the attorney(s)/person(s) listed below by mailing, with the correct postage thereon, or by causing the same to be hand delivered.

Attorney(s)/Person(s) served:

Method of Service:

Idaho Supreme Court
451 West State Street
Boise, ID 83702

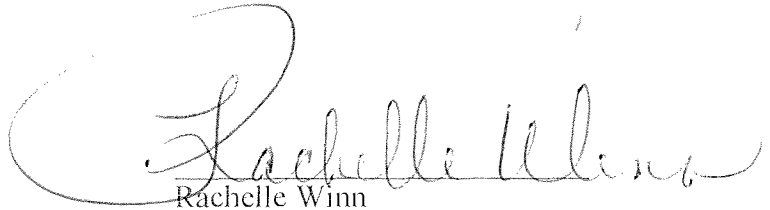
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Rachelle Winn
Legal Assistant

1 A. Yes.
2 Q. Would you consider somewhat dramatic
3 presentations to be one characteristic of a person
4 who might be bipolar, particularly when they're in
5 their more manic stages?
6 A. Yes.
7 MR. GARDNER: I don't think I have anything
8 else at this point.
9 MR. MEIKLE: I do. Some redirect.
10
11 FURTHER EXAMINATION
12 BY MR. MEIKLE:
13 Q. The PTSD that Matthew has, was it
14 predominantly caused by the burn injury?
15 A. Yes.
16 MR. GARDNER: I didn't have an opportunity to
17 object. I would move my objection precede the
18 comment, and I'm going to object again as to the
19 foundation. It is speculative in the nature of our
20 psychiatry and it is without any basis and without
21 having reviewed a complete history of this
22 gentleman's past medical and psychiatric history.
23 Q. BY MR. MEIKLE: Let me ask this: Is the
24 burn injury the predominant cause of Mathew's PTSD?
25 A. Yes. I'm sorry.

1 MR. GARDNER: I'm going to move my -- yes.
2 You're answering too quickly here.
3 THE WITNESS: I'm sorry.
4 MR. GARDNER: I'll move my objection precede
5 the answer. First of all, it's the exact same
6 question. Same objections.
7 Q. BY MR. MEIKLE: Okay. Does the AMA
8 recognize psychiatric care and psychiatric diagnoses?
9 A. Yes.
10 Q. Is it accepted?
11 A. Yes.
12 Q. And are the opinions you've given today
13 and in your letter given to a reasonable degree of
14 medical certainty in your profession?
15 A. Yes.
16 MR. GARDNER: Just a minute. Let me --
17 again, this has been asked and answered four or five
18 times and is repetitive. And, once again, just in
19 case there are some movements towards rendering those
20 opinions, I have to object to foundation on that.
21 Go ahead, Doctor.
22 THE WITNESS: Yes.
23 MR. MEIKLE: I think that's all I have.
24
25

1 FURTHER EXAMINATION
2 BY MR. GARDNER:
3 Q. Doctor, I take it any opinion you've
4 rendered today, you haven't taken into account any
5 other burn injuries, any things such as this that
6 might have occurred in his life? You weren't even
7 aware of them, probably.
8 A. I'm not aware of any substantial burn
9 injuries requiring medical hospitalizations for
10 extended periods of time.
11 Q. And I don't know in your -- do you have
12 a history of sexual abuse as a child on this
13 gentleman?
14 A. There was a single episode that I'm
15 aware of with the -- I think, a babysitter, where he
16 was asked to masturbate. He then informed his family
17 and there was no repeat occurrence is my
18 understanding.
19 Q. If this has stuck in his mind such that
20 that history begins to repeat itself throughout the
21 years in medical and psychological history, would you
22 consider that a significant event in terms of molding
23 this young man?
24 A. Not particularly, because the -- it
25 might be something that you would recall, but the

1 response of the adults in the environment were to
2 protect him and there wasn't a reoccurrence. So he
3 had a -- there was a positive outcome to the episode,
4 so it was --
5 Q. Now, the information -- I'm sorry. Go
6 ahead.
7 A. It would clearly be something you would
8 recall, but it wouldn't necessarily have a
9 significant negative impact.
10 Q. I guess my question is are you arguing
11 with the facts there, because you were not present
12 when any of this occurred; is that correct? You
13 weren't treating him at the time?
14 A. No, I was not.
15 Q. Okay. And any of that information you
16 just related now had to have come secondhand from
17 Mr. Mazzone?
18 A. Correct.
19 MR. GARDNER: All right. I don't have
20 anything else.
21 MR. MEIKLE: That's all I have.
22 THE WITNESS: Okay.
23 (The deposition concluded at 11:01 a.m.)
24 --ooOoo--
25